BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

JULIO ALONSO
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-153
Case No. 72-8624

S.S.A. No.

The claimant appealed from Referee's Decision No. LA-18890 which held him ineligible for benefits commencing September 24, 1972 under section 1253(c) of the Unemployment Insurance Code on the ground that he was not available for work.

STATEMENT OF FACTS

The claimant is an alien. When he filed his claim for benefits effective September 4, 1972 a Department interviewer asked to see his alien registration card in order to establish whether he was legally in this country. The claimant told the Department interviewer that he had lost his card and had not requested a replacement. However, he gave the interviewer his alien registration number. Because he did not have his registration card he was held unavailable for work.

At the hearing before the referee the claimant refused to state whether or not his entry into the United States was legal. His refusal was not on the basis that his answer would tend to incriminate him, but rather that such evidence was irrelevant in determining whether he was available for work. He gave no reason as to why he had not obtained a duplicate registration card.

REASONS FOR DECISION

Subdivision (c) of section 1253 of the Unemployment Insurance Code provides that a claimant is eligible to receive benefits with respect to any week only if he was able to work and available for work for that week.

The burden is upon an unemployment compensation claimant to prove that he is available for work (Loew's Inc., et al. v. California Employment Stabilization Commission, et al. (1946), 76 C.A. 2d 231; Ashdown v. Department of Employment (1955), 135 C.A. 2d 291; Spangler v. California Unemployment Insurance Appeals Board (1971), 14 C.A. 3d 284).

The claimant in this case has refused to answer questions or submit proof as to whether his entry into the United States was legal. His refusal is based upon the assertion that such evidence is irrelevant. We do not agree for if the claimant is in this country illegally an issue arises as to whether it would be against public policy to grant benefits to the claimant (Benefit Decision No. 6153). The failure of the claimant to produce evidence of his status when it was within his power to do so gives rise to an inference that his entry into this country was illegal and we so find (Evidence Code, sections 412 and 413).

In the final analysis, availability is a question to be determined from all the circumstances which exist in a particular case. Among the circumstances to thus be considered is that of public policy.

Public Law 283, 82nd. Congress, "An Act to Assist in Preventing Aliens from Entering or Remaining in the United States Illegally" has as a primary purpose "to strengthen the law generally in preventing aliens from entering or remaining in the United States illegally: (House Rep. No. 1377, 82nd Cong. 2d Sess; Herrera v. U.S., 208 Fed. 2d 215 at 216). This statute (sometimes referred to as the "wet-back Bill") includes, among other things, a provision making it a felony to knowingly encourage, either directly or indirectly, the entry into the United States of any aliens not duly admitted. This statute and the others making up the immigration laws of the United States create a public policy of the United States (Coules v. Pharris, 212 Wis. 558, 250 N.W. 404).

It would be an absurd consequence for the Department of Human Resources Development of the State of California to assist a person, an illegal entrant, seeking advantages that, in our opinion, are available only to citizens and others who are lawfully admitted to our country. Denied unemployment benefits, he will not be as likely "to succeed in maintaining himself and accomplishing his cheat upon the government." This rationale was applied by the Supreme Court of Wisconsin to deny illegal entrants the right to sue for wages (Coules v. Pharris, Supra; but see: Dezsofi v. Jacoby, 36 NYS 2nd. 672, a decision by a New York trial court which reaches a contrary result on less persuasive reasoning under the circumstances; cases such as Martinez v. Fox Valley Bus Lines, 17 Fed. Supp. 578, and Janusis v. Long, 284 Mass. 403, 188 N.E. 228 are distinguishable in that they involve personal injury actions and are based on the theory that even an illegal entrant is entitled to protection from violence).

We do not feel compelled by the Fourteenth Amendment or the laws adopted under it to grant benefits to the claimant. If an alien comes here legally, he is entitled to equal protection of the Law (Ex parte Kurth, 28 Fed. Supp. 258, 263), but the claimant, being an illegal entrant, "does not have the status of a non-resident alien, or resident alien, and while it may be difficult according to the strict definitions of international law to classify him, it clearly appears that he is a defiant person challenging the ability of this country to enforce its own laws." The protection of the Fourteenth Amendment does not extend to giving an illegal entrant the right to demand the assistance of the State "in frustrating the plain purpose of Congressional Acts regulating immigration" (Coules v. Pharris, Supra.). Nor does the rule of liberal construction require that we do more than interpret the statute so as to carry into effect the will of the legislature (81 C.J.S. 140; Cf. C.E.C. v. Kovacevich, 27 Cal. 2d 546, 550). Unemployment Compensation Acts are designed for the protection of the general welfare and the claimant is not the only person to be considered (Krisman v. U.C.C., 351 Mo. 18, 171 S.W. 2d. 575).

Our conclusion that the claimant is not entitled to benefits has a rational basis related to a national as well as state public policy and is reasonably calculated to carry out that policy (Dandridge v. Williams (1970), 397 U.S. 471, 90 S. Ct. 1153).

We have an obligation not to subvert the federal statutory scheme which controls the presence of aliens and immigrants in this country. This scheme is codified in Title 8 of the United States Code. That title prescribes detailed procedures to which aliens and immigrants are subject. It imposes registration requirements on aliens, it subjects them to physical examination and fingerprinting, it controls the circumstances under which they can work in this country, etc. Among other things, Congress has shown concern that jobs which might otherwise be available to aliens lawfully residing here and to American citizens, might be taken by persons coming to this country unlawfully. For that reason, aliens are often required to obtain a certification from the United States Attorney General that they may lawfully engage in their particular work or occupation. See 8 U.S.C. § 1182(a)(14), (1964 Ed. Supp. V).

Providing benefits to, and referring to work, aliens who are illegally in this country and who have not been certified for work, either through work permits or otherwise, the State, in effect, would be subverting the federal scheme and would be subsidizing persons who are performing illegal acts. Clearly the State of California has a duty not to undermine the alien registration law or to compromise the intent of Congress that jobs be first available to American citizens and aliens lawfully residing here and entitled to work.

Our position that a claimant for benefits must establish his right to be and remain in this country does not violate any protections against self-incrimination. Our position is not aimed at incriminating anyone. It is in a purely civil context and related to statutes concerning the award of monetary benefits to the particular claimant. As has been recently stated, "There is nothing unfair or violative of due process about requiring an alien to communicate with immigration officials concerning nonincriminatory aspects of his immigration status." Lanqui v. INS, 422 F. 2d 807 (7th Cir. (1970)). That principle applies here.

The claimant's situation may be analogized to the case of a driver of an automobile who is required to stop and furnish his name and address after involvement in an automobile accident. In the recent case of California v. Byers, 402 U.S. 424 (1971), California Vehicle Code § 20002(a)(1)(Supp. 1971) was attacked as violating the

privilege against self-incrimination. Byers maintained that for him to have stopped and given his name and address after the automobile accident in which he was involved would have confronted him with "substantial hazards of self-incrimination." The United States Supreme Court noted preliminarily that an organized society often imposes burdens on its constituents. For example,

> "It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion." 402 U.S. at 427-428.

The court went on to note that in each of the described situations there was some possibility of prosecution, that information revealed by the reports could well be a "link in the chain" of evidence leading to prosecution and conviction. Nevertheless, the court held, "the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here".

In our opinion, it is not in the interest of public policy, nor was it the intention of the legislature, to grant unemployment insurance benefits to persons in the claimant's position.

DECISION

The decision of the referee is affirmed. Benefits are denied under section 1253(c) of the Unemployment Insurance Code.

Sacramento, California, June 5, 1973.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

JOHN B. WEISS

CARL A. BRITSCHGI

DISSENTING - Written Opinion Attached

DON BLEWETT

EWING HASS

DISSENTING OPINION

Ostensibly, the claimant herein has been denied benefits under subdivision (c) of section 1253 of the Unemployment Insurance Code. This subdivision provides that a claimant is eligible to receive benefits with respect to any week only if he was able to work and available for work for that week.

In Appeals Board Decision No. P-B-17, we stated that in order for a claimant to be considered available for work, he must be ready, willing and able to accept suitable employment in a labor market where there is a demand for his services. Also, a claimant is not available for work if through personal preference or force of circumstances he imposes unreasonable restrictions on suitable work such as limitations on hours, days, shifts or wages which materially reduce the possibility of obtaining employment.

There is no evidence in this case and the majority opinion makes no finding that the claimant has imposed any restrictions on suitable work as to hours, days, shifts or wages. Nor does it appear that he has restricted the kinds of work he will accept or the distance he will travel in order to accept work. He is in the same labor market area as he was at the time he earned the wage credits upon which his present claim for benefits is founded. If employers are reluctant to hire persons who are unwilling or unable to produce a registration card, the evidence does not show it. In other words, the claimant meets our established definition of availability in that he is ready, willing and able to accept suitable employment in a labor market and has imposed no restrictions on suitable work which would reduce his possibilities of obtaining employment. Thus, there is no basis in the record for a denial of benefits under subdivision (c) of section 1253 of the code. However, the majority has stated that <u>public policy</u> is to be considered in determining availability for work.

Public policy may be a proper consideration in determining eligibility for unemployment insurance benefits but that public policy should be expressed somewhere within the language of the code itself for

this is the place we may expect to learn something of the legislative intent. Fortunately, that intent has been well expressed in section 100 of the Unemployment Insurance Code, from which we quote as follows:

> "The Legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the policy power of the State, for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." (Emphasis added)

Eligibility for unemployment insurance benefits, as well as disqualification from benefits, are encompassed by sections 1251 through 1265.5 of the code. Benefits are payable to unemployed individuals (section 1251 of the code). There are no provisions in the Unemployment Insurance Code which require citizenship as a prerequisite to eligibility nor is the term alien used in establishing eligibility requirements.

In McCarthy v. City of Oakland (1943), 60 Cal. App. 2d 546, 141 P. 2d 4, it was contended that it would be contrary to public policy to pay a pension to the widow of a deceased police officer because she had been convicted of a felony and imprisoned. In that case, with respect to the question of public policy, the court stated:

> "Public policy is sometimes declared by judicial decision, but where a legislative body having jurisdiction over pension rights has enacted specific provisions on the subject, the public policy on that subject is established thereby. Even in such a case as the present, if the controlling rule operates unjustly the remedy lies with such legislative authority. (Jordan v. Retirement Board, 35 Cal. App. 2d 653 /96 P. 2d 973/) Whatever the courts may think about the matter from the standpoint of policy they are powerless to interfere."

We have pointed out that the legislature has enacted specific eligibility requirements in the code. None of these eligibility requirements can serve to deny benefits to this claimant. The public policy as expressed in section 100 of the code is to provide benefits for the persons unemployed through no fault of their own and to reduce involuntary unemployment and the suffering caused thereby to a minimum. This is the only public policy with which we may be concerned. This claimant, insofar as the record is concerned, is unemployed through no fault of his own. Therefore, we find no basis for a denial of benefits.

DON BLEWETT

EWING HASS